

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLOTTE OLIPHANT-JOHNS	:	Civil Action
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	No. 01-2578

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

December 13, 2002

Plaintiff, Charlotte Oliphant-Johns (“Oliphant-Johns”), filed this action alleging violation of Title VII of the Civil Rights Act (42 U.S.C. § 1983) ¹ and 43 Pa. Cons. Stat. Ann. §§ 954 and 955 ² against defendant, City of Philadelphia (“City”). This court has jurisdiction under 42 U.S.C. § 1983.

Defendant filing a Motion to Strike, alleged plaintiff’s complaint was extremely unclear. On October 12, 2001, the court granted defendant’s Motion and plaintiff was given leave to file an amended complaint. On November 5, 2001, plaintiff filed an amended complaint; thereafter, the City filed a Motion to Dismiss ³ the amended

¹ § 1983 states: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” 42 U.S.C. 1983.

² § 955 states: “It should be an unlawful discriminatory practice... (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.”

³ Although the City has named the motion a Motion to Dismiss it was actually a Motion for Summary Judgment because the City referenced material not in the amended complaint. By considering the amended complaint only, we treat the motion as a Motion to Dismiss under Fed. R. Civ. P. 12(b).

complaint for failure to state a cause of action and untimeliness. On January 14, 2002, in response to the City's second Motion to Dismiss, Oliphant-Johns filed a Motion to Strike.

BACKGROUND

Ms. Oliphant-Johns was employed by the City for nine and half years as a community health worker. On December 10, 1999, Oliphant-Johns had a verbal altercation with her supervisor and was dismissed from her employment on February 11, 2000. This action arises from her termination by the City.

Plaintiff challenged her dismissal by filing a complaint with the Philadelphia Civil Service Commission; her dismissal was upheld on May 25, 2000. Oliphant-Johns then appealed to the Court of Common Pleas. The court affirmed the Commission's decision on November 14, 2000.

On November 2, 2000, Oliphant-Johns filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination because of her ethnic origin (Hebrew background). The EEOC issued Oliphant-Johns a Right to Sue letter on March 6, 2001. She filed this action, pro se, on May 30, 2001, with a request that counsel be appointed. She asked for compensation, expungement of her record, and/or another city position. The action was placed in administrative suspense pending appointment of counsel. After several failed attempts to find an attorney for Oliphant-Johns, the action was removed from administrative suspense on August 17, 2001; plaintiff is now proceeding pro se.

DISCUSSION

I. Standard for Motion to Dismiss

The defendant has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for

failure to state a claim upon which relief can be granted. In determining such a motion, a court must accept all factual allegations of the complaint as true and make all reasonable inferences in favor of the non-moving party. See, Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). There is no presumption of the truthfulness of legal conclusions, deductions or opinions but a motion to dismiss may be granted if the court finds that an affirmative defense, such as the bar of the statute of limitations, is apparent from the face of the complaint. See Kaiser Aluminum, Etc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982).

The plaintiff has filed a motion to strike in response to the motion to dismiss. In a pro se pleading, the plaintiff will be granted some leeway in presenting her case; any possible set of facts entitling the plaintiff to relief will be heard. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). Therefore, the motion to strike will be considered as a response to the motion to dismiss.

II. Timeliness of EEOC Charge

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., requires the plaintiff to file a timely charge with the EEOC before initiating suit in federal court. Tjoutuk v. Gardner, No. 93-49001994, U.S. Dist. LEXIS 6442, at *6 (E.D. Pa. May 12, 1994). The EEOC has a duty to serve the charge upon a person against whom such charge was made within ten days. The purpose of requiring the plaintiff to file a charge with the EEOC is to permit notice to the charged party and provide each chance for the parties to settle the situation without resorting to litigation. Id.

The EEOC charge of an alleged unlawful employment practice must be filed within one hundred and eighty days in “non-deferral” states but in “deferral” states, such

as Pennsylvania, the EEOC charge must be filed within three hundred days after the alleged unlawful employment practice occurs. See Bailey v. United Airlines, 279 F.3d 194, 197 (3d Cir. 2001). The City argues that Oliphant-Johns failed to file a timely EEOC complaint because she did not meet the one hundred and eighty-day time limit.

There is a proviso: “no charge may be filed... by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated...” 42 U.S.C. § 2000e-5(c). In deferral states the EEOC and state agency work in concert to provide the most effective protection to those discriminated against. If the EEOC receives a charge directly from one alleging discrimination it automatically sends it to the state agency. The EEOC must then wait sixty days before it can consider the charge filed with its office. See Seredinski v. Clifton Precision Products Co., 776 F.2d 56, 61 (3d Cir. 1985).

Here the last alleged unlawful employment practice was the firing of Oliphant-Johnson February 11, 2000. Oliphant-Johns filed her charge against the City with the EEOC on November 2, 2000. The time between February 11, 2000 and November 2, 2000 is two hundred and sixty days. If the three hundred day time frame were the only limiting factor Oliphant-Johns would have clearly met the time limitations in Pennsylvania. There is no statement of record that Oliphant-Johns filed with the Pennsylvania Human Relations Commission before filing with the EEOC and she does not allege anywhere in her complaint or amended complaint that she filed with the state agency prior to the EEOC filing. Therefore, we presume that she first filed with the EEOC; but the charge was not “filed” with the EEOC until three hundred and twenty days

after her dismissal, ⁴ because the EEOC was obliged to wait sixty days to give the state agency a chance to consider the charges. See Seredinski, 776 F.2d at 62.

A motion to dismiss may be granted if the court finds that an affirmative defense, such as the bar of the statute of limitations, is apparent from the face of the complaint. Kaiser, 677 F.2d at 1050. The Supreme Court has held that the filing period requirement of Title VII operates as a statute of limitations, and is subject to waiver as well as tolling when equity so requires. Tjoutuku, 1994 U.S. Dist. LEXIS 6442, at *8. However, Oliphant-Johns has not stated any reason for tolling the statute of limitations. Her claims will be dismissed for having been filed beyond the statutory limitations period. Ordinarily, the court would dismiss with leave to amend if Oliphant-Johns could assert a timely state filing. But leave to amend would be futile because the Complaint must be dismissed for failure to exhaust administrative remedies.

III. The current charges must have been presented to the EEOC.

Even if the charge were timely filed, a court has no jurisdiction over a workplace discrimination charge not first asserted in the EEOC charge. See Mroczek v. Bethlehem Steel Corp., 126 F.Supp.2d 379, 384 (3d. Cir. 2001). Before a claim can be considered exhausted, it must have been included in the plaintiff's charge with the administrative agency.

Oliphant-Johns alleged discrimination based on ethnic background in her EEOC charge by checking the box labeled "other" on the EEOC form and stating, "I believe that I have been discriminated against because of my ethnic origin (Hebrew Background)."

⁴Oliphant-Johns waited two hundred and sixty days to file the discrimination charge with the EEOC after the last discriminatory incident. The EEOC had to wait sixty additional days before it could consider the complaint filed, a total of three hundred and twenty days.

The EEOC forms specifically say to “check appropriate box(es)”. The available boxes are: “race,” “color,” “sex,” “religion,” “age,” “retaliation,” “national origin,” “disability” and “other.” Oliphant-Johns could have checked every box if she believed she was subject to discrimination based on more than just her ethnic background. Or she could have checked the appropriate boxes and explained in the box marked “the particulars...”. Checking the box labeled “other” means no items specifically listed applies.

The amended complaint does not complain of discrimination based on her Hebrew background; it states she is seeking redress for a hostile environment and psychological abuse. The hostile environment is not alleged to be due to any type of discrimination protected by Title VII. Oliphant-Johns lists several people whom made discriminatory statements, events surrounding her dismissal and the demands of the job. No incident in the amended complaint alleges treatment different than any other person similarly situated based on her Hebrew background. ⁵

Specific notice to the EEOC is required to give the administrative agency a chance to address the problem before it reaches court. See Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996) (no duty of the EEOC to investigate a charge not complained of, even if the undisclosed discrimination could have been discovered upon investigation by the EEOC). The amended complaint essentially alleges unjust termination based on abusive and stressful working conditions. These matters were properly before the Civil Service Commission (although her dismissal was upheld) but were not before the EEOC so they

⁵ A plaintiff must show that the employer had knowledge of the condition in which the discrimination is based. It is unlikely her employer or co-workers knew of her ethnic background. See Geraci v. Moody-Tottrup International Inc., 82 F.3d 578, 581 (to make a prima facie case of unlawful discharge based on pregnancy, plaintiff must show that employer knew she was pregnant).

cannot be asserted in this action. Oliphant-Johns did not include the claims in her amended complaint in her EEOC charge. Therefore, we do not have jurisdiction to hear this action. The City's motion to dismiss will be granted. Ms. Oliphant-Johns' motion to strike will be denied as moot.

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v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 01-CV-2578
	:	

ORDER

AND NOW, this 13th day of December, 2002, it is **ORDERED** that:

1. Defendant's Motion to Dismiss is **GRANTED**.
2. Plaintiff's Motion to Strike is **DENIED AS MOOT**.

S.J.